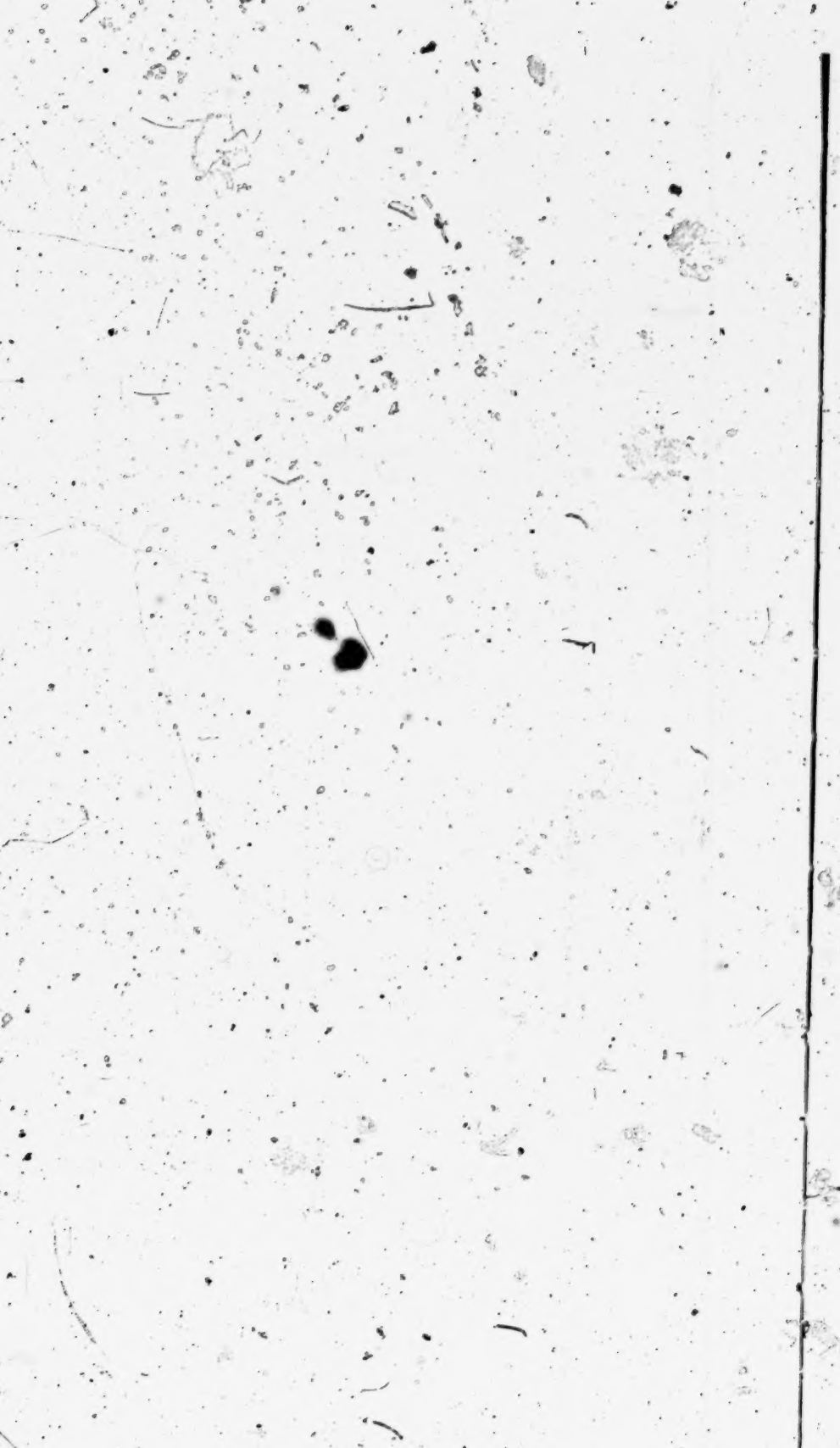

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 541

GERTRUDE VANDERBILT WHITNEY AND CORNELIUS VANDERBILT, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ALICE G. VANDERBILT, DECEASED, AND SAID CORNELIUS VANDERBILT, INDIVIDUALLY; GLADYS SZECHENYI, CATHLEEN VANDERBILT LOWMAN, GLORIA LAURA MORGAN VANDERBILT, INFANT, AND THOMAS B. GILCHRIST, AS GENERAL GUARDIAN OF THE PROPERTY OF SAID INFANT,

Appellants,

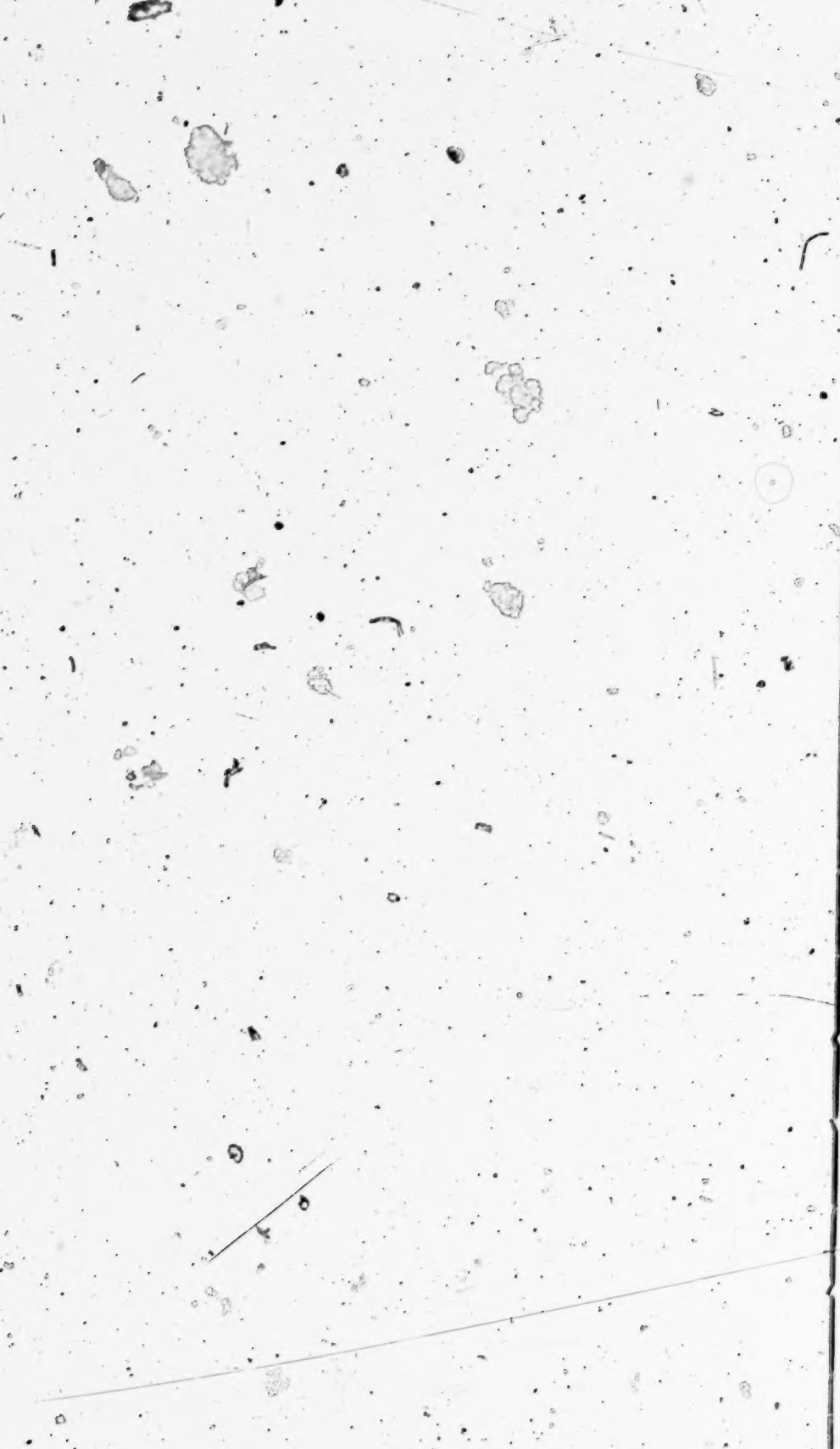
against

STATE TAX COMMISSION OF THE STATE OF NEW YORK.

APPEAL FROM THE SURROGATE'S COURT OF THE STATE OF NEW YORK.

MOTION TO DISMISS OR AFFIRM.

MORTIMER M. KASSELL,
Counsel for Appellee.



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Appellants,

against

STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellee.

APPEAL FROM THE SURROGATE'S COURT OF THE STATE OF NEW YORK.

MOTION TO DISMISS OR AFFIRM.

MAY IT PLEASE THE COURT:

Now comes the appellee in the above entitled cause, by their counsel of record, and moves that the appeal herein

be dismissed, or that the order and decree appealed from be affirmed.

This motion is made upon the ground that the questions upon which the decision of the cause depends are so insubstantial as not to need further argument.

Appellants' first assertion in their jurisdictional statement is that the statute in question violates the due process of the Fourteenth Amendment of the Constitution of the United States. The decisions of this Court have long established that a death tax upon transfer of property by the exercise of a special power of appointment can validly be imposed in the estate of the donee of such power without violating the Fourteenth Amendment.

Orr v. *Gilman* (1902), 183 U. S. 278, affirming *Matter of Dows*, 167 N. Y. 227;

Chanler v. *Kelsey* (1907), 205 U. S. 466, affirming *Matter of Delano*, 176 N. Y. 486.

The principle of the above cited cases is equally applicable to an estate tax such as is imposed by the State of New York. To sustain the validity of such a tax it is not necessary that the decedent own the property or be able to derive some economic benefit therefrom. Validity depends upon whether the death of the decedent effects a shifting of economic benefits.

Chase National Bank v. *United States* (1929), 278 U. S. 327;

Tyler v. *United States* (1930), 281 U. S. 497;

Gwinn v. *Commissioner* (1932), 287 U. S. 224;

Porter v. *Commissioner* (1933), 288 U. S. 436;

Commissioner v. *Chase National Bank* (1936), 82 F. (2d) 157 (C. C. A. 2d), cert. denied 299 U. S. 552;

United States v. *Jacobs* (1939), 306 U. S. 363.

The exercise of a power of appointment clearly effects a transmission of economic benefits. (*Orr* v. *Gilman, supra*; *Chanler* v. *Kelsey, supra.*)

Appellants' claim in their jurisdictional statement designated as the "first equal protection question" merits no further consideration than that accorded by this Court in *Chase National Bank* v. *United States, supra*, 278 U. S. 327, where it was said (pages 338-9):

> "The objection urged by plaintiff under the second question, that the statutory method of fixing the tax and securing its payment infringes the 5th Amendment, need not detain us. It is said that both the tax on those who share in the decedent's estate and that paid by the beneficiaries is larger than it otherwise would be if the proceeds of the insurance had not been included in the decedent's gross estate. But the increase in the tax to both is a consequence of including the amount of the policies in the gross estate in determining the net which is made the measure of the graduated transfer tax. The objection amounts to no more than saying that if the transfer of the policies or their proceeds be taxed, they should not be included with the other property of the estate in determining the rate of the tax. As it is the termination of the power of disposition of the policies by decedent at death which operates as an effective transfer and is subjected to the tax, there can be no objection to measuring the tax or fixing its rate by including in the gross estate the value of the policies at the time of death, together with all the other interests of decedent transferred at his death. Stebbins *v.* Riley, 268 U. S. 137. The inclusion in the gross estate of gifts made in contemplation of death under § 402 (c) has a like effect."

The contention that the Fourteenth Amendment embraces a wider area of prohibition than the Fifth on the question under consideration was negatived by this Court in *Stebbins* v. *Riley* (1925), 268 U. S. 137.

Appellants' "second equal protection question" designated in their jurisdictional statement is also insubstantial.

The statute served to remove discrimination, not to create it. This is apparent from the history of the taxation of powers of appointment in New York. Under Article 10 of the Tax Law, which imposed a transfer tax as to decedents who died prior to September 1, 1930, general and special powers of appointment were taxed upon their exercise, not upon their creation (Section 220). In 1930, the New York Legislature enacted Article 10-C of the Tax Law and thereby substituted for the former transfer tax, an estate tax modeled on the Federal estate tax. Under said Article 10-C (applicable to decedents dying after September 1, 1930) general powers are taxed upon their creation and upon their exercise, while special powers are taxed upon their creation but not upon their exercise (Section 249-r, subdivisions 1 and 7). It was thus apparent that while special powers created and exercised before September 1, 1930, were taxed upon their exercise and such powers created and exercised after said date were taxed upon their creation, such powers created prior thereto, but exercised thereafter, were not subject to any tax whatsoever. To remove this inequality, the New York Legislature in 1932 enacted subdivision 7-a of section 249-r of the Tax Law. Said subdivision provides for the inclusion in decedents' gross estates of property passing under the exercise of limited powers of appointment where the transfer of the property had not been subjected to taxation at the time the powers were created.

The test provided for in the statute is whether the transfer of the property had theretofore been subjected to taxation. This Court has repeatedly sustained the validity of such a classification.

Watson v. State Comptroller (1920), 254 U. S. 122, affirming *Matter of Watson*, 226 N. Y. 384;

Stebbins v. *Riley, supra* (1925), 268 U. S. 137;
Klein v. *Board of Tax Supervisors* (1930), 282 U. S. 19;
Welch v. *Henry* (1938), 305 U. S. 134.

Binney v. *Long* (1936), 299 U. S. 280, is inapplicable. In that case the Massachusetts Legislature imposed a different tax on successions under powers created before a certain date than on powers created subsequent thereto. The clear distinction, as pointed out by the Court of Appeals, is that in the case at bar the powers taxed under subdivision 7-a are those which otherwise would escape all taxation and which by the law in effect at the time of their creation, were expressly made subject to tax in the donees' estates upon their exercise.

Appellee respectfully requests that the appeal therein be dismissed for want of a substantial Federal question.

Dated, October 30, 1939.

MORTIMER M. KASSELL,
Counsel for Appellee.